No. 88-309 and 88-553

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF WYOMING

Petitioner,

v.

UNITED STATES OF AMERICA,
SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
OF THE WIND RIVER INDIAN RESERVATION, *et al.*

Respondents.

CITY OF RIVERTON, WYOMING, *et al.*,

Cross-Petitioners,

v.

UNITED STATES OF AMERICA,
SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
OF THE WIND RIVER INDIAN RESERVATION, *et al.*

Cross-Respondents.

On Petition and Cross-Petition for a Writ of Certiorari to the Supreme Court of Wyoming

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BRIEF IN OPPOSITION FOR RESPONDENTS AND CROSS-RESPONDENTS SHOSHONE AND NORTHERN ARAPAHO TRIBES

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QUESTIONS PRESENTED

In this case, which involves the water rights of the Shoshone and Northern Arapaho Tribes (the "Tribes") of the Wind River Indian Reservation (the "Reservation"), the Supreme Court of Wyoming ruled unanimously that water rights were impliedly reserved for the Tribes under the Second Treaty of Fort Bridger (the "Treaty"), 15 Stat. 673, pursuant to which the Reservation was established in 1868. The Wyoming Supreme Court also ruled unanimously that the proper measure of the amount of water reserved for the agricultural purposes of the Reservation was the 'practicably irrigable acreage" standard adopted by this Court in *Arizona v. California*, 373 U.S. 546, 595-601 (1963).

The questions presented by the petition in No. 88-309 are:

1. Whether the Court should review the rulings below that, in accordance with *Winters v. United States*, 207 U.S. 564 (1908) and its progeny, water rights were impliedly reserved under the Treaty, and that those rights were not abrogated or superseded by a 1905 statute that earmarked certain funds—a portion of the Indians' own proceeds from land sales under the statute—for the purpose of "securing" their water rights from challenge by the State of Wyoming.

2. Whether the Court should review the ruling below that applied the practicably irrigable acreage standard, a standard described by this Court in *Arizona v. California*, 373 U.S. at 601, as "the only

feasible and fair way" to quantify Indian reserved water rights for agricultural purposes.

3. Whether the Court should review the ruling below that assigned a priority date of 1868—the date of the Treaty—to the water rights reserved under the Treaty.

The questions presented by the cross-petition in No. 88-553 are:

1. Whether the Court should review the ruling below that rejected the proposed water-storage requirements and other preconditions on the exercise of the Tribes' reserved water rights under the Treaty, a ruling that expressly considered and is fully consistent with this Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978).

2. Whether the Court should review the ruling below that applied an economic discount rate fully supported by the evidence, a ruling that is not in conflict with any other decision.

3. Whether the Court should review the ruling below regarding the proper priority date to be assigned to reserved water rights associated with land within the Reservation that is now owned by non-Indians.

4. Whether the Court should review the ruling below that rejected the insubstantial claim that the United States should be estopped from asserting reserved water rights on behalf of the Tribes in this proceeding.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	7
I. Wyoming and Riverton Are Wrong in Contending that They Have Suffered an Injustice at the Hands of Their Own State Courts.	9
II. The Questions Presented by Wyoming and Riverton Were Correctly Resolved by the Wyoming Courts and Do Not Warrant Review.	16
A. Water Rights Were Impliedly Reserved Under the 1868 Treaty, and Those Rights Were Not Abrogated or Superseded by the Water Proviso to the 1905 Act.	16
1. *Winters* and *Arizona I*	16
2. The Water Proviso to the 1905 Act	19
B. The Wyoming Courts Were Correct in Applying the PIA Standard To Quantify the Water Rights Reserved Under the Treaty for the Agricultural Purposes of the Reservation.	25
C. The Supreme Court of Wyoming Correctly Assigned a Priority Date of 1868—the Date of the Treaty—to the Reserved Water Rights Under the Treaty.	33
1. Lands Opened for Non-Indian Settlement, But Not Sold, Under the 1905 Act	33
2. Reservation Lands Reacquired by the Tribes	38
D. The Supreme Court of Wyoming Demonstrated More than Ample "Sensitivity" to Non-Indian Water Users.	39

E. Riverton's Discount-Rate Argument Is Without Merit and Unworthy of Review. 42

F. The Supreme Court of Wyoming Correctly Rejected Riverton's Estoppel Argument. 43

CONCLUSION 45

Exhibit A, *United States v. Hampleman*, No. 753 (D. Wyo. June 26, 1916) 1a

Exhibit B, Agreement Regarding Water Rights in the Crowheart Irrigation Unit on the Wind River Indian Reservation (July 29, 1988) 3a

TABLE OF AUTHORITIES

CASES	Page
Arizona v. California, 373 U.S. 546 (1963)	*passim*
Arizona v. California, 460 U.S. 605 (1983)	9,17,26-31,37
Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983)	17
Ash Sheep Co. v. United States, 252 U.S. 159 (1920)	37
Cappaert v. United States, 426 U.S. 128 (1976)	13,17,20,28,29,31,41
Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981)	31,38
Conrad Investment Co. v. United States, 161 F. 829 (9th Cir. 1908)	17
County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985)	24,25
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)	5,17
Heckler v. Community Health Services, 467 U.S. 51 (1984)	43
In re Gallivan, 60 I.D. 417 (1950)	37
Johnson v. Davis, 698 F.2d 1088 (10th Cir. 1983)	43
Merrill v. Bishop, 287 P.2d 620 (Wyo. 1955)	11
Montana v. Confederated Salish and Kootenai Tribes, 712 P.2d 754 (Mont. 1985)	32
Nevada v. United States, 463 U.S. 110 (1983)	9,17
Oregon Department of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985)	37
Public Service Commission v. Brashear Freight Lines, Inc., 306 U.S. 204 (1939)	15

Table of Authorities Continued

	Page
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)	25,36
Shoshone Tribe v. United States, 299 U.S. 476 (1937)	2,29
Skeem v. United States, 273 F. 93 (9th Cir. 1921)	17
Solem v. Bartlett, 465 U.S. 463 (1984)	25,34,39
United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984)	31
United States v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1956)	17
United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)	31,38,39
United States v. Dion, 476 U.S. 734 (1986)	24
United States v. District Court In and For the County of Eagle, 401 U.S. 520 (1971)	11,17
United States v. Hampleman, No. 753 (D. Wyo. June 26, 1916)	11,22,24
United States v. Hibner, 27 F.2d 909 (D. Idaho 1928)	17
United States v. McIntire, 101 F.2d 650 (9th Cir. 1939)	17
United States v. New Mexico, 438 U.S. 696 (1978)	12,17,29,31,39-42
United States v. Parkins, 18 F.2d 642 (D. Wyo. 1926)	11,17,22,24
United States v. Powers, 94 F.2d 783 (9th Cir. 1938), *aff'd*, 305 U.S. 527 (1939)	17
United States v. Shoshone Tribe, 304 U.S. 111 (1938)	2,12,15,18
Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)	25,29

Table of Authorities Continued

	Page
White Mountain Apache Tribe v. United States, 11 Cl. Ct. 614 (1987)	31
Winters v. United States, 207 U.S. 564 (1908)	*passim*
TREATY, STATUTES AND AGREEMENTS	
First Treaty of Fort Bridger, 18 Stat. 685 (Part 3) (1863)	2
Second Treaty of Fort Bridger, 15 Stat. 673 (1868)	*passim*
Act of March 3, 1905, 33 Stat. 1016	*passim*
Brunot Agreement, 18 Stat. 291 (1872)	3
First McLaughlin Agreement, 30 Stat. 62, 93-95 (1896)	3,24
41 U.S.C. § 1962d-17(a)	42
McCarran Amendment, 43 U.S.C. § 666	5
Mont. Code Ann. § 85-20-201 (1987)	25
Wyo. Stat. § 1-37-106 (1977)	4
MISCELLANEOUS	
F. Cohen, Handbook of Federal Indian Law (1982)	14,24,29,42
Hearings before the Subcommittee of the Committee on Indian Affairs, Indian Appropriations Bill 379 (1914)	23
Report of Simon H. Rifkind, Special Master, *Arizona v. California*, No. 8 Original (Dec. 5, 1960)	14,26-29,31,32

BRIEF IN OPPOSITION FOR RESPONDENTS AND CROSS-RESPONDENTS SHOSHONE AND NORTHERN ARAPAHO TRIBES

Respondents and Cross-Respondents the Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation in Wyoming respectfully request that this Court deny the Petition for a Writ of Certiorari of the State of Wyoming in No. 88-309 and the Cross-Petition for a Writ of Certiorari of the City of Riverton, Wyoming, *et al.* ("Riverton"), in No. 88-553. This brief is submitted in opposition to both the petition and the cross-petition in accordance with Justice White's Order of November 16, 1988.

STATEMENT OF THE CASE

This case concerns the reserved water rights of the Shoshone and Northern Arapaho Indian Tribes under the Second Treaty of Fort Bridger, Act of July 3, 1868, 15 Stat. 673, pursuant to which the United States set apart the Wind River Indian Reservation as a permanent homeland—originally for the Shoshone Tribe and, later, for both the Shoshone and the Northern Arapaho Tribes (the "Tribes").

History of the Wind River Indian Reservation

In 1868, the United States and the Shoshone Tribe, which were military allies and had long maintained friendly relations, entered into the Second Treaty of Fort Bridger (the "Treaty"). 15 Stat. 673; Petitioner's Appendix ("Pet. App.") at 9a, 793a. Under its terms, the United States "set apart" a tract of land—approximately 3,054,182 acres—in what was later to become the State of Wyoming "for the absolute and undisturbed use and occupation of the Shoshonee Indians." Treaty at art. 2. In return, the Shoshone Tribe agreed to make this reservation, now known as the Wind River Indian Reservation (the "Reservation"), its "permanent home." *Id.* at art. 4. The Tribe

further agreed to "relinquish all title, claims, or rights" to a vast tract of 44,672,000 acres of land in what are now the States of Wyoming, Colorado, and Utah that had been recognized as "Shoshonee country" under a prior treaty, known as the First Treaty of Fort Bridger, 18 Stat. 685 (Part 3) (1863). Treaty at art. 2; Pet. App. at 9a.

The Shoshones had been a nomadic people dependent upon hunting and fishing for their subsistence. Pet. App. at 9a, 617a-18a, 686a. Accordingly, they faced an enormous transition in converting from their traditional ways to life on the Reservation.

One of the purposes of the Treaty was to assist the Shoshones in making this transition by "help[ing] to create an independent permanent farming community upon the reservation." *United States v. Shoshone Tribe*, 304 U.S. 111, 118 (1938). In various provisions of the Treaty, the United States agreed to assist and encourage the Tribe in the agricultural development of the Reservation. Treaty at arts. 3, 6-10, 12.

The United States also permitted the Shoshones, whose "loyalty . . . to the people of the United States has been conspicuous and unfaltering," *Shoshone Tribe v. United States*, 299 U.S. 476, 486 (1937), to select the lands that were to comprise the Reservation. Petition ("Pet.") at 4. The Shoshones selected lands that were ideally suited for agricultural development. As a result of the abundant runoff from the Wind River Mountains, the selected lands, though located in a semi-arid region, were "the choicest and best-watered portion of Wyoming" and included "fertile river valleys conveniently irrigable." *United States v. Shoshone Tribe*, 304 U.S. at 114. The United States reserved these lands by Treaty for the permanent homeland of the Shoshones before the Territory of Wyoming was created and more than twenty-one years before Wyoming was admitted into the Union in 1890.

Although originally set apart for only the Shoshone Tribe, the Reservation has since become the permanent homeland of both the Shoshone and Northern Arapaho Tribes. The two Tribes have jointly occupied the Reservation since 1878. Pet. App. at 9a-10a.

In 1872 and 1896, the Tribes agreed to cede back to the United States certain portions of the original Reservation in return for fixed cash payments.[1] The 1896 cession had been sought by the Tribes as a means of raising desperately needed cash. *Id.* at 10a. The transition to Reservation life proved to be slow and difficult, and, notwithstanding the ample water and fertile lands on the Reservation, the early attempts of the Indians to develop an agricultural economy had failed. *Id.* Indeed, by 1895 the Tribes had become totally dependent on the United States for food, clothing and shelter. *Id.*

In 1904 the Tribes, still experiencing substantial problems in developing an agricultural economy, entered into an agreement with the United States, later ratified by Congress in the Act of March 3, 1905 (the "1905 Act"). 33 Stat. 1016; Pet. App. at 769a. Under the 1905 Act, the United States was authorized to act as trustee for the Tribes in opening for non-Indian settlement approximately 1,480,000 acres of the Reservation, essentially its northern two-thirds. The 1905 Act, unlike the earlier cessions, did not involve an outright sale of Reservation lands in return for a fixed cash payment. Rather, the United States agreed to act only "as trustee for said Indians to dispose of said lands," and obligated itself to pay the Tribes "the proceeds received from the sale [of the opened lands] only as [those payments were] received [by the Government]." 1905 Act at art. 9; Pet. App. at 774a.

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[1] Brunot Agreement, 18 Stat. 291 (Shoshone Tribe ceding 700,642 acres for $27,500); First McLaughlin Agreement, 30 Stat. 62, 93-95 (Shoshone and Northern Arapaho Tribes ceding 55,000 acres "and the water rights appertaining thereunto" for $60,000).

The opening for settlement of the northern portion of the Reservation, though much heralded, proved to be a dismal failure. The congressman who sponsored the 1905 Act had predicted that land sales would generate $1.8 million, but by 1914 only 128,986 acres—less than 10 per cent of the opened portion of the Reservation—had been sold for little more than $250,000. Pet. App. at 412a. In 1915, as a result of the minimal demand for these lands, the Secretary of the Interior temporarily discontinued further sales of the opened lands, and, from 1915 through 1934, only a few tracts involving a small number of acres were sold. *Id.* at 412a-13a. In 1934, the Secretary again discontinued such sales. Thereafter, the trust arrangement pursuant to which the opened lands were offered for sale by the United States was formally terminated. *Id.* at 413a. Most of the opened lands are still owned by the Tribes.

The Shoshones and Northern Arapahos are now engaged in irrigated farming on substantial portions of the Reservation, *id.* at 463a-531a, but there remain large unfarmed tracts of irrigable Reservation land. *Id.* at 532a-80a; 229a-30a.

History of the Adjudication

The State of Wyoming initiated this adjudication of the Tribes' reserved water rights under the Treaty more than a decade ago in Wyoming's own state courts in connection with a general adjudication of water rights in the Big Horn River Basin. Wyoming obtained jurisdiction to adjudicate the water rights of the Tribes by joining the United States in the state-court proceeding pursuant to a jurisdictional statute enacted by the State Legislature only two days before the proceeding was filed. Wyo. Stat. § 1-37-106 (1977); Pet. App. at 726a. This statute was designed to permit the State to litigate this proceeding in state, rather than federal, court.[2]

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[2] The statute—which Wyoming has used only in connection with this proceeding—was specifically tailored to meet the requirements of the

The United States and the Tribes sought to defeat the State's choice of forum, but these efforts were strenuously and successfully opposed by the State.[3] Thereafter, the Tribes intervened in the state proceeding to protect their water rights under the Treaty.

In May 1979, the state district court appointed a Special Master approved by all the parties to conduct the adjudication.[4] The Special Master divided the proceeding into three phases. The first phase—the only one at issue here—was a determination of Indian reserved water rights.

On December 15, 1982, following several years of extensive pretrial discovery as well as conferences and hearings involving "more than 100 attorneys, transcripts of more than 15,000 pages and over 2,300 exhibits," Pet. App. at 14a, the Special Master signed his 451-page Report and proposed Decree regarding the water rights reserved for the Tribes under the Treaty. *Id.* at 367a.

The Rulings Below

The Special Master flatly rejected the State's argument that water rights were not reserved under the Treaty. Relying upon *Winters v. United States*, 207 U.S. 564 (1908)

McCarran Amendment, 43 U.S.C. § 666, as elaborated by this Court in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), for waiver of sovereign immunity by the United States in state water adjudications. Pet. App. at 389a-93a.

[3] When the United States petitioned to remove the proceeding to federal district court, the State persuaded that court to remand the proceeding to state court in light of the McCarran Amendment and this Court's decision in *Colorado River*. Pet. App. at 720a-723a; *see supra* note 2. After remand to the state court, Wyoming successfully opposed a motion by the United States, which the Tribes had supported, to dismiss the state proceeding on the ground that the state court lacked jurisdiction to resolve the reserved water rights of the Tribes and the United States. *Id.* at 11a-12a.

[4] The Special Master, the Honorable Teno Roncalio, had previously served as a Member of the United States House of Representatives from Wyoming.

("*Winters*"), and its progeny—in which this Court has consistently held that, when Indian reservations were established, water rights were impliedly reserved to satisfy the purposes of the reservations—the Special Master ruled that "Congress, by the Treaty of 1868, impliedly created a reservation for water on the Wind River Indian Reservation to satisfy the purposes of that Treaty." Pet. App. at 432a. With respect to the Treaty's purpose of promoting agriculture, the Special Master ruled that the proper measure of the amount of water reserved under the Treaty was that necessary to irrigate all the "practicably irrigable acres" on the Reservation (the "PIA standard"). *Id.* at 532a. The Special Master then quantified that amount in a painstaking analysis of the massive evidentiary record. *Id.* at 446a-580a. In applying the PIA standard, the Special Master noted that he was following this Court's ruling in *Arizona v. California*, 373 U.S. 546, 601 (1963), that "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." Pet. App. at 532a.

The Special Master further held that the purpose of the Treaty was to permit the Indians to develop a "permanent homeland" on the Reservation, a purpose broader than simply developing an agricultural economy. *Id.* at 441a-42a. Accordingly, he ruled that the total amount of water reserved under the Treaty included not only that quantified under the PIA standard, but also that necessary for certain non-agricultural uses, including mineral development, municipal uses, and fisheries. *Id.*

The district court affirmed the Special Master's ruling that water rights were reserved under the Treaty, rejecting the State's argument as contrary not only to "this Court's interpretation of what the intent of Congress was but also . . . to the controlling case law on the subject." *Id.* at 211a. The district court also affirmed the Special Master's use of the PIA standard. *Id.* at 228a-29a. But the district court rejected the Special Master's ruling that

the purpose of the Reservation was to create a permanent homeland for the Indians, holding instead that the purpose was "to convert the Indians from a nomadic to an agrarian people." *Id.* at 219a. Having concluded that "the sole purpose of the Reservation was agriculture," *id.* at 220a, the court reduced the total amount of water quantified by the Special Master to only that determined by the PIA standard. *Id.* at 221a.

The Supreme Court of Wyoming, affirming the rulings of the Special Master and the district court, held that there was "an intent to reserve water" under the Treaty, *id.* at 26a, and that it was "correct [to] quantify[] the Tribes' reserved water right by the amount of water necessary to irrigate all of the reservation's practicably irrigable acreage." *Id.* at 47a. Contrary to the ruling of the Special Master, the Supreme Court of Wyoming, by a vote of three to two, affirmed the district court's ruling regarding the purpose of the Reservation, holding that "the intent at the time [of the Treaty was] to create a reservation with a sole agricultural purpose." *Id.* at 38a. In light of this conclusion, the state supreme court majority affirmed the reduction of the amount of water reserved for the Tribes to only that quantified under the PIA standard.

REASONS FOR DENYING THE WRIT

The State of Wyoming initiated this adjudication involving the federal treaty rights of the Tribes over a decade ago in Wyoming's own state courts pursuant to a specially enacted jurisdictional statute, and vigorously resisted the efforts of the United States and the Tribes to defeat the State's choice of forum. The State ultimately won the right to litigate the dispute in its own courts.

Wyoming then attempted to exploit its home-court advantage by challenging even the most basic rights of the Tribes under the Treaty. First, even though reserved water rights under the Treaty had been recognized judicially as

early as 1926, the State sought to revisit the issue, urging the Wyoming courts to rule that there are no such rights under the Treaty. Second, notwithstanding this Court's definitive ruling on the PIA standard in *Arizona v. California*, 373 U.S. 546, 600-01 (1963) ("*Arizona I*"), the State argued that, if there are reserved water rights under the Treaty, the PIA standard is too generous a measure of those rights.

The Wyoming courts rejected both of the State's arguments, concluding that they were contrary to controlling precedents of this Court and to prior case law specifically recognizing reserved water rights under the Treaty. Indeed, the State lost these issues at *every* level of its own state court system.

Neither of these issues—nor for that matter any of the litany of other issues raised by Wyoming and Riverton—warrants review. In ruling that the Treaty created reserved water rights, the Wyoming courts properly held that this case was controlled by *Winters* and its progeny. The State's principal argument below—and again here—is that the so-called "water proviso" to the 1905 Act somehow effected a taking of the Tribes' vested property by terminating their reserved water rights under the 1868 Treaty. But, as the Wyoming courts correctly ruled, the water proviso, which simply governed how a portion of the Indians' own proceeds from 1905 Act land sales were to be spent, falls far short of that necessary to meet this Court's strict standards for finding an abrogation of Indian treaty rights. In any event, review is not warranted because the issue—which turns on the unique statutory language, legislative history and contemporaneous administrative interpretation of the water proviso—has no general applicability.

With respect to the PIA standard, the Wyoming courts correctly followed *Arizona I*, 373 U.S. at 595-601, where

this Court, after considering several other proposed standards for quantifying reserved water rights for agricultural purposes on Indian reservations, ruled that PIA—"enough water . . . to irrigate all the practicably irrigable acreage"—was "the *only* feasible and fair way by which reserved water for the reservations can be measured." *Id.* at 600, 601 (emphasis added). The alleged conflicts among the lower courts on the PIA standard simply do not exist. Moreover, as the Wyoming courts correctly recognized, the PIA standard—a standard for quantifying the reserved water rights for Indian reservations for agricultural purposes—is fully consistent with this Court's decisions after *Arizona I* quantifying reserved water rights for federal enclaves created for non-agricultural purposes.

The State's effort here to modify the PIA standard would call into question twenty-five years of litigation and settlements throughout the West that have been based on this Court's ruling in *Arizona I* that PIA is "the only feasible and fair way" to quantify Indian reserved water rights for agricultural purposes. This Court has repeatedly admonished Indian tribes for failing to respect "the compelling need for certainty" in Western water-rights adjudications. *Arizona v. California*, 460 U.S. 605, 620 (1983) ("*Arizona II*"); *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983). These concerns apply with equal force to the State's arguments here. Thus review should be denied.

I. Wyoming and Riverton Are Wrong in Contending that They Have Suffered an Injustice at the Hands of Their Own State Courts.

Wyoming and Riverton labor mightily to create the impression that they have been forced to bear a series of inequities inflicted by their own state courts. This suggestion is sufficiently implausible that perhaps no response is needed. Nevertheless, in light of the fact that Wyoming and Riverton devote so much space to this proposition,

the following points are in order before turning to the specific questions presented.

First, contrary to the suggestion of Wyoming and Riverton that their arguments were not given due consideration below, the legal arguments advanced by Wyoming and Riverton were carefully considered by the Wyoming courts in decisions that span over 700 pages of the Petitioner's Appendix in No. 88-309. The Wyoming courts also painstakingly analyzed the testimony and documentary evidence submitted by all parties, including Wyoming and Riverton, and entered extensive findings of fact. Pet. App. at 635a-90a, 243a-62a, 169a. Rather than relying here on those findings of fact, Wyoming and Riverton instead cite repeatedly to their own trial exhibits, *e.g.*, Pet. at 4-7, 13 n.12; Cross-Petition in No. 88-553 ("Cross-Pet.") at 3-5, 6 n.5, making the same arguments here that were considered and consistently rejected by the Wyoming courts.

Second, contrary to the impression that Wyoming and Riverton seek to create that the rulings below were adverse only to them, the Wyoming courts ruled against the Tribes and the United States on a number of significant issues, several of which are set forth in the Tribes' conditional cross-petition in No. 88-492. Indeed, the Wyoming courts ruled for the Tribes only on the most well settled of Indian water rights, namely, water rights reserved for agricultural purposes quantified under the PIA standard. Moreover, in applying the PIA standard, the Wyoming courts rejected some 50,000 of the approximately 150,000 acres that the Tribes and United States had originally proposed as practicably irrigable acreage. Pet. App. at 72a.

Third, Riverton is simply wrong in asserting that "application of the reserved right doctrine *at this late date* on the Reservation applies *a new rule* . . . for the establishment of water rights on the Reservation." Cross-Pet. at 28-29 (emphasis added). The United States began formally to assert reserved water rights on behalf of the

Tribes after this Court's *Winters* ruling in 1908, Pet. App. at 30a, and by 1916, the federal district court in Wyoming had enjoined the State Water Commissioner from interfering with the water rights of individual Indians on the Reservation.[5] Indeed, by 1926, the federal district court had specifically recognized the existence of reserved water rights under the 1868 Treaty, *United States v. Parkins*, 18 F.2d 642, 643 (D.Wyo. 1926),[6] a ruling that Wyoming and Riverton neglect to mention to this Court. In short, Wyoming and Riverton—not the Tribes or the United States—are seeking to rewrite history in this proceeding,

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[5] United States v. Hampleman, No. 742 (U.S.D.C. Wyo. June 25, 1916) (ruling that the water rights of the Indians "are within the absolute and exclusive jurisdiction" of the United States) (unpublished order reproduced herein as Exhibit A).

[6] In *Parkins*, the federal district court held that the 1868 Treaty "like all other treaties with the Indians creating reservations, contemplates the use and benefit of the lands within the reservation to its wards, the Indians, which likewise includes the irrigation of those lands, they being arid in character." 18 F.2d at 643 (citing Winters v. United States, 207 U.S. 564 (1908)).

Similarly, in Merrill v. Bishop, 287 P.2d 620 (Wyo. 1955), which involved a dispute over the water rights of non-Indians who had acquired allotted lands on the Reservation, the Supreme Court of Wyoming acknowledged that:

> It must, of course, be admitted that according to the holding in Winters v. United States, . . . , the water rights appurtenant to the Indian Reservation here in question were reserved to the Indians by the treaty of 1868.

Id. at 623 (citation omitted). The *Merrill* court then raised but did not decide the question whether the rights reserved under the Treaty had later been abrogated by Congress when it admitted Wyoming into the Union. *Id.* at 623-26. This Court had rejected this type of abrogation argument before *Merrill*, *see* Winters, 207 U.S. at 597-98, and has done so consistently since *Merrill*, *see* United States v. District Court In and For the County of Eagle, 401 U.S. 520, 522-23 (1971); Arizona I, 373 U.S. 596-98. Accordingly, the Wyoming courts correctly rejected the argument in this proceeding, Pet. App. at 26a-28a, 31a-32a, and the State has not sought review of this question.

for reserved water rights under the Treaty have been judicially recognized for over sixty years.

Fourth, Riverton is wrong in asserting that this case gives rise to the concern expressed in *United States v. New Mexico*, 438 U.S. 696, 705 (1978), that reserved water rights may "require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." Because of the abundant run-off from the Wind River Mountains, the Reservation is "the best-watered portion of Wyoming." *United States v. Shoshone Tribe*, 304 U.S. at 114. Accordingly, when the Bureau of Indian Affairs honored the Tribes' reserved rights on the Reservation during the drought of this past summer, it resulted in virtually no water loss to non-Indian irrigators.[7]

Riverton is simply misrepresenting the record in asserting that "[t]his is a case in which the findings below demonstrate that there will be a gallon for gallon reduction in water available to state and private water users as a result of the quantification of a Federal reserved water right." Cross-Pet. at 18. There was never any such finding in this proceeding, and the Supreme Court of Wyoming expressly held that there is "no indication" that the use by the Tribes of their reserved water would cause a "gallon for gallon reduction in the water available for other uses." Pet. App. at 71a. Moreover, the state district court

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[7] As Riverton notes, there was a dispute this past summer regarding a water shortage on one irrigation project on the Reservation. Cross-Pet. at 8 n.9. What Riverton fails to note, however, is that the Tribes and the State, working together under an agreement signed by the Governor and the Chairmen of the Business Councils of the Tribes, determined that the shortage in question was "*not* the result of an actual shortage of water supply, but rather [was] the result of problems with management of the water supply and of the need for structural improvement in the irrigation and delivery system." Agreement at 1 (emphasis added) (reproduced as Exhibit B, page 3a *infra*). The dispute was then settled to the satisfaction of the Tribes and the State after certain water management changes were implemented to ensure that all water users would receive their full legal entitlement.

specifically deleted its only finding that the quantification would have *any* adverse effect on other water users.[8]

Fifth, in their repeated assertions that the Wyoming courts quantified an excessive amount of water in light of the current irrigation needs of the Tribes, Wyoming and Riverton miss the whole point of Indian reserved water rights. The essence of such rights is that they "vest[]" and become "effective" when an Indian reservation is created in an amount necessary "to satisfy the *future* as well as the present needs" of the reservation. *Arizona I*, 373 U.S. at 600 (emphasis added). In so defining these rights, this Court correctly recognized that Indian reservations throughout the West would be largely worthless if the Indians were left to compete with non-Indians for water under the state-law doctrine of prior appropriation.[9] There are compelling historical reasons why the Indians would invariably have lost the race to the stream under the doc-

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[8] Riverton's assertion regarding a "gallon-for-gallon reduction" is apparently based on the district court's original Finding of Fact Number 98, Pet. App. at 258a, but, as even Riverton must acknowledge, Cross-Pet. at 14-15 n.17, the district court later deleted that finding. Pet. App. at 169a. In any event, the original Finding of Fact Number 98 simply stated that "the construction of any one or all of the [Tribes'] future [irrigation] projects would have *an adverse effect* on other water users," *id.* at 258a (emphasis added), not that the use of water for these projects would result in a "gallon-for-gallon reduction" for other water users.

Similarly, the Special Master did not find that there would be a "gallon-for-gallon reduction." He simply found that full use by the Tribes of their reserved water rights "may have an adverse effect on many appropriators." Pet. App. at 630a. The Special Master did not purport to quantify this effect, *see id.* at 632a-34a, and, in any event, the district court deleted its only finding of adverse effect.

[9] "Under the doctrine of prior appropriation, the first to divert and use water beneficially establishes a right to its continued use as long as the water is beneficially diverted." Cappaert v. United States, 426 U.S. 128, 139-40 n.5 (1976).

trine of prior appropriation,[10] and why, even today, many Indian reservations, such as the Wind River Reservation, have yet to achieve full agricultural development.[11]

Sixth, Wyoming's fanciful assertion here that there has been "full irrigation development" on this Reservation, Pet. at 23-26, is completely without support in the record and is contradicted by the findings of the Wyoming courts that there are large unfarmed tracts of practicably irrigable acreage on the Reservation. Pet. App. at 532a-580a; 229a-230a.

Finally, the equitable arguments advanced here by Wyoming and Riverton not only are overblown,[12] but also are

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[10] "The Indians were not an agricultural people and it was necessary for them to develop their agricultural skills after settling on the Reservations. . . . [I]f they were thrown into competition with the more advanced non-Indians in a race to acquire rights to water by putting it to beneficial use, they would have lost the match before it was begun." Report of Simon H. Rifkind, Special Master, *Arizona v. California*, No. 8 Original, at 261 (Dec. 5, 1960). Indeed, as the Wyoming courts noted, the first few decades of agricultural development on the Wind River Reservation, notwithstanding its ample waters and fertile lands, were a complete failure, causing the Indians to have to sell a portion of their land to raise cash to support themselves. Pet. App. at 10a.

[11] Indian farmers were hampered in their later efforts to catch up in the race to the stream by the fact that "[i]rrigation systems and other water resource projects often require substantial investments, and Congress has tended to give a higher priority to projects that benefit non-Indians." F. Cohen, Handbook of Federal Indian Law 598 (1982). This has certainly been true on the Wind River Reservation, as illustrated by the Riverton Reclamation Project. As a result of these funding disparities, many Indian reservations, including Wind River, have not as yet achieved full agricultural development.

[12] As previously noted, reserved water rights under the 1868 Treaty have been judicially recognized for over sixty years, and the state district court specifically deleted its only finding that the quantification of the Tribes' water rights in this proceeding would have *any* adverse

outweighed by those favoring the Tribes. The events culminating in the 1868 Treaty and the terms of the Treaty itself lend compelling support to the conclusion that, at the very least, the Treaty reserved an amount of water sufficient to irrigate the practicably irrigable acreage on the Reservation.[13] *See supra* pages 1-2. Moreover, the United States and the Tribes entered into the 1868 Treaty before Wyoming was even a Territory and more than thirty-five years before the passage of the 1905 Act upon which the equitable arguments of Wyoming and Riverton are based. In addition, the water quantified under the PIA standard is now desperately needed to improve the Reservation economy, where the unemployment rate among Indians exceeds 70 per cent. *See infra* note 37. In short, the equities weigh decidedly in favor of the Tribes.

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effect on other water users.

It should also be noted that the relief sought by the State in its complaint commencing this adjudication was only a quantification of all water rights in this region of Wyoming. As the State received the relief it prayed for, further review at its request is inappropriate. *Cf.* Public Service Comm'n v. Brashear Freight Lines, Inc., 306 U.S. 204, 206 (1939).

[13] As this Court has previously ruled, the terms of this Treaty "are to be construed in the sense in which naturally the Indians would understand them." United States v. Shoshone Tribe, 304 U.S. at 116. In light of the terms of the Treaty and its history, there can be no doubt that when the Shoshones entered into the Treaty, they "naturally . . . would [have] under[stood]" that, at the very least, the Tribe would be permitted to use all the water necessary to accomplish the agricultural objectives of the Reservation.

II. The Questions Presented by Wyoming and Riverton Were Correctly Resolved by the Wyoming Courts and Do Not Warrant Review.

A. Water Rights Were Impliedly Reserved Under the 1868 Treaty, and Those Rights Were Not Abrogated or Superseded by the Water Proviso to the 1905 Act.

1. *Winters* and *Arizona I*

The Wyoming courts correctly held that water rights were impliedly reserved when the Reservation was established pursuant to the 1868 Treaty. Pet. App. at 431a-39a, 210-13a, 26a-32a. As the Wyoming courts recognized, this case is controlled by *Winters* and *Arizona I*. This Court held that, when each of the six Indian reservations at issue in those decisions was established, water was impliedly reserved to satisfy the purposes of the reservation.

In *Winters*, the Court found this intent implicit in the circumstances surrounding the creation of the Fort Belknap Indian Reservation and the 1888 Agreement pursuant to which it was created. As the Court noted, the purpose of the 1888 Agreement was to assist the Indians in "chang[ing] [their] habits" from that of a "nomadic and uncivilized people" to that of "a pastoral and civilized people." 207 U.S. at 576. The Court further noted that a reservation of water was essential to accomplish that purpose because the lands on the Fort Belknap Reservation "were arid and, without irrigation, were practically valueless." *Id.* ~~In those~~ circumstances, and in light of the fact that the Indians had ceded "a very much larger tract" in return for these lands, the Court concluded that water rights had been impliedly reserved for the Indians under the 1888 Agreement. *Id.*

Similarly, in *Arizona I*, this Court, noting that "[m]ost of the land in these [five Indian] reservations is and always has been arid," held that water for agriculture had been

impliedly reserved when the reservations were established, because the United States "intended to deal fairly with the Indians by reserving for them waters without which their lands would have been useless." 373 U.S. at 598, 600. In short, an intent to reserve water "is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Cappaert v. United States*, 426 U.S. 128, 138 (1976) ("*Cappaert*"), citing *Winters* and *Arizona I*.

Winters and *Arizona I* have been cited with approval by this Court in every federal and Indian reserved water rights case since they were decided.[14] Moreover, the lower courts have repeatedly followed *Winters* and *Arizona I* in finding an intent to reserve water on other Indian reservations.[15]

The Wyoming courts correctly held that this case was indistinguishable from *Winters* and *Arizona I*. As was true of the Indian reservations in those cases, one of the purposes of the Wind River Indian Reservation—indeed, according to the Supreme Court of Wyoming, its "sole . . . purpose"—was to encourage the previously nomadic In-

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[14] United States v. District Court In and For the County of Eagle, 401 U.S. 520, 522-23 (1971); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 805 (1976); Cappaert v. United States, 426 U.S. 128, 139 (1976); United States v. New Mexico, 438 U.S. 696, 700 n.4 (1978); Arizona v. California, 460 U.S. 605, 616 (1983); Nevada v. United States, 463 U.S. 110, 116 n.1 (1983); Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 550 n.2 (1983).

[15] *E.g.*, Conrad Investment Co. v. United States, 161 F. 829 (9th Cir. 1908); Skeem v. United States, 273 F. 93 (9th Cir. 1921), United States v. Hibner, 27 F.2d 909, 911 (D. Idaho 1928); United States v. Parkins, 18 F.2d 642, 643 (D. Wyo. 1926); United States v. McIntire, 101 F.2d 650 (9th Cir. 1939); United States v. Powers, 94 F.2d 783, 785 (9th Cir. 1938), *aff'd*, 305 U.S. 527 (1939); and United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956).

dians to develop an agrarian economy.[16] Pet. App. at 38a, 216a-22a. Moreover, as was true of the reservations in *Winters* and *Arizona I*, this agricultural objective simply could not be accomplished on the Reservation without water, for, as the district court specifically found:

> Much of the reservation land was arid. The water was needed for irrigation and was essential to the raising of crops. Without water most of the land would have been useless.

Pet. App. at 211a. In these circumstances, the Wyoming courts correctly held that water rights were impliedly reserved under the 1868 Treaty; indeed, as the Special Master noted, "[a]ny other conclusion would appear to be contrived, and contrary to Supreme Court precedent."[17] Pet. App. at 434a.

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[16] In addition, as was true of the Indians in *Winters*, the Shoshones agreed under the 1868 Treaty to cede their rights to a vast tract of land (44,672,000 acres) in return for a permanent home on a much smaller tract (3,054,182 acres) on which they were to pursue a new way of life. United States v. Shoshone Tribe, 304 U.S. at 113.

The Tribes agree that one of the purposes of the Reservation was to encourage the Indians to develop an agricultural economy, but disagree with the holding of the Supreme Court of Wyoming that the Reservation had a *sole* agricultural purpose. *See* Tribes' Cross-Petition in No. 88-492 at 11-18.

[17] The State asserted below that "[t]he Reservation was in essence a gift to [Shoshone Chief] Washakie for his assistance to the United States in the years preceding 1868" and that the Shoshones were to relocate on the Reservation "to begin a new life as farmers." Brief of Appellee State of Wyoming in Response to the Appellants' Briefs of the United States and Tribes (Type 2 Claims) 64, 65 (Feb. 24, 1986). Thus, in disputing the existence of reserved water rights under the 1868 Treaty, the State is asserting that the Reservation was a "gift" to the Shoshones on which they were to become farmers, but that the gift came without water, even though, as the district court found, "[w]ithout water most of the land would have been useless." Pet. App. at 211a. In *Winters* and *Arizona I*, this Court specifically rejected the same argument, namely, that "Congress had created an Indian Reser-

2. The Water Proviso to the 1905 Act

The State asserts that the "water proviso" to the 1905 Act was a decision by Congress to defer to Wyoming law for the acquisition of all water rights for the Wind River Indian Reservation. Pet. at 12-18. The State's argument here is the culmination of its dogged but meritless effort throughout this proceeding to create, for the Wind River Reservation, an isolated exception to *Winters* and its progeny.

Under the water proviso, a portion of the proceeds to the Indians from the sale of their land under the 1905 Act—if "any balance" remained after other specified payments—was to be "devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in *securing* water rights from said State." Pet. App. at 772a (emphasis added). The proceeds earmarked by the proviso were then used, as the proviso directed, for the purpose of "securing" the water rights of the Indians from challenge by Wyoming. *Id.* at 30a.

Wyoming raises two arguments based on the water proviso. The State first argues that the existence of reserved water rights under the 1868 Treaty "is contrary to the intent of Congress" in enacting the water proviso to the 1905 Act. Pet. at 12, 13-16. But, as the Special Master noted in a related context, this argument "wholly lacks any chronological perspective." Pet. App. at 437a. The source of the reserved water rights for the Reservation is the 1868 Treaty, and Wyoming's argument "fails to address the question of what was the Congressional intent in 1868, the date of the treaty," *id.*, much less the intent of the Indians at that time. The Wyoming courts thus correctly recognized that the intent of Congress in 1905 is irrelevant to the question presented here, namely,

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vation without intending to reserve waters necessary to make the reservation livable." Arizona I, 373 U.S. at 599; Winters, 207 U.S. at 576.

whether water rights were reserved under the 1868 Treaty ratified by the Senate almost forty years before the 1905 Act.[18]

Moreover, even if the intent of Congress nearly four decades later were somehow relevant, the Wyoming courts correctly ruled that the existence of reserved water rights under the 1868 Treaty "is not inconsistent with the [water proviso to the] pre-Winters 1905 Act." *Id.* at 29a. The purpose of the water proviso was not, as the State urges, to subject the water rights of the Indians to exclusive state jurisdiction. Rather, as the only historian who testified on this point concluded, the proviso was an attempt on the part of the United States "to cover as many bases as it could" to protect the Indians in the face of legal uncertainty regarding their treaty rights prior to this Court's definitive 1908 ruling in *Winters*.[19] Iverson Tr. 543. Under the proviso, a portion of the Indians' own proceeds from land sales under the 1905 Act were earmarked for "securing" their water rights from challenge by Wyoming in the event that the courts might later determine that com-

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[18] One of the most important attributes of Indian reserved water rights is that they "vest[]" and become "effective" when an Indian reservation is created. Arizona I, 373 U.S. at 600. *Accord*, Cappaert, 426 U.S. at 138-40 & n.5. The reserved water rights for the Wind River Reservation are, therefore, property rights that either were or were not established in 1868. By their very nature, the initial existence of these water rights depends upon what took place in 1868, not on what happened in 1905.

[19] The water proviso was a prudent response to two pressing considerations in 1905: (1) the non-Indians who would be entering the Reservation under the 1905 Act would immediately begin the race to the stream under the doctrine of prior appropriation, and (2) this race was to begin when there was necessarily "some uncertainty in the status of Indian water rights" before this Court's 1908 ruling in *Winters*. Pet. App. at 28a. If the courts later determined that there were in fact no reserved water rights under the 1868 Treaty, and the Indians had not "secur[ed]" their water rights from challenge by Wyoming, the Indians would have lost the race before it began.

pliance with state law was required. Accordingly, as the Supreme Court of Wyoming correctly held, the state water rights "secur[ed]" for the Indians with the proceeds earmarked by the proviso were acquired not in lieu of their reserved water rights under the 1868 Treaty, but rather as a pre-*Winters* precaution to safeguard their right to water. Pet. App. at 28a-31a.

This interpretation of the water proviso, as the Wyoming courts recognized, is supported by the express terms,[20] legislative history[21] and contemporaneous admin-

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[20] The State errs in asserting that the water proviso to the 1905 Act "expressly requires the acquisition of [the] reservation's water rights under state law." Pet. at 12. The water proviso did not *require* the acquisition of anything; it simply governed how a portion of the proceeds from the 1905 Act land sales were to be spent if there was "any balance" remaining after other specified payments were made. Indeed, if there had not been "any balance" remaining, the proviso would have had no force whatever. As it happened, there was a remaining balance. But, once those remaining proceeds were spent, the proviso, by its express terms, had served its only purpose and imposed no further requirements on the Tribes or the United States. The water proviso thus falls far short of an express congressional requirement that all water rights for the Reservation be acquired under state law.

The express terms of the proviso reveal that its purpose was to assist the Indians in "securing [their] water rights from said state." The use of the word "securing" in the proviso is consistent with the legislative history and contemporaneous administrative interpretation of the proviso that reveal that it was intended as a pre-*Winters* measure to "secur[e]" or protect the water rights of the Indians from challenge by the State in the event that the courts might later determine that compliance with state law was required.

[21] As the Supreme Court of Wyoming noted, the water proviso was enacted partially in response to concerns of the Indians who, prior to *Winters* and on the eve of opening a large portion of the Reservation to non-Indians under the 1905 Act, were understandably "eager to secure their water rights." Pet. App. at 28a. In response to these concerns, the Government's negotiator, referring to the proceeds that were to be earmarked under the proviso, advised the Indians that "[i]t would be well to use this surplus in securing your water rights so that

istrative interpretation of the proviso.[22] The State submitted 348 so-called "intent and purposes" exhibits in an effort to show "a conscious, deliberate attitude on the part of Congress that if the Indians were to expect any water, they must rely on and comply with the system of appropriation established by state law." Pet. App. at 436a-37a. But the Special Master, in a ruling affirmed by the district court and the Wyoming Supreme Court, concluded that "[w]hile lengthy, bulky, and large in number, the exhibits . . . lack the qualitative content necessary to support the

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the whiteman cannot deprive you of water with which to irrigate your lands." Minutes of Council, Shoshone Agency, Wyoming, April 19, 1904; Plaintiff's Exhibit WRIR-8. Thus, as the Supreme Court of Wyoming held, the Indians "understood that the agreement would make their water rights firm." Pet. App. at 29a. Wyoming seeks to turn the proviso on its head by asserting that this prudence on the part of the Indians in agreeing to earmark a portion of their *own* proceeds from 1905 Act land sales should be construed as a "fulfill[ment]" by Congress of the prior treaty rights of the Indians. Pet. at 15-16.

[22] As the Supreme Court of Wyoming recognized, there was "some uncertainty" on the part of federal officials prior to *Winters* regarding the legal status of reserved rights on the Reservation. Pet. App. at 28a. But the United States began asserting such rights after *Winters*, while initially also continuing to pursue state water rights. *Id.* at 30a. Shortly thereafter, what Wyoming characterizes as the "extensive cooperation between the Indian Service and the Wyoming State Engineer" in the "[d]evelopment of Indian irrigation projects on the Reservation," Pet. at 5, became far less extensive and far less cooperative. In 1910, as the Supreme Court of Wyoming noted, the United States "refused to apply to the State for an extension of time in which to complete the irrigation project authorized by the 1905 Act." Pet. App. at 30a. In 1911, a dispute arose when State "Water Commissioner Hampleman first closed the headgates on an allottee's ditches claiming that [the Shoshone farmer] had no valid state permit." *Id.* As a result of this dispute, the United States filed suit asserting reserved water rights under the 1868 Treaty, and obtained an injunction against the Water Commissioner. United States v. Hampleman, *supra*; Pet. App. at 30a. In 1926, the United States again filed suit asserting reserved water rights under the 1868 Treaty, and the federal district court explicitly recognized the existence of such rights. United States v. Parkins, *supra*.

State's argument." *Id.* at 437a. The Supreme Court of Wyoming specifically held that "[a] reservation of water with an 1868 priority date is not inconsistent with the [state] permit provisions of the pre-Winters 1905 Act."[23] *Id.* at 29a.

The Wyoming courts also correctly rejected Wyoming's second argument based on the proviso—that even if there were reserved water rights under 1868 Treaty, those rights were "terminated by the express language of the water proviso."[24] Pet. at 16-17. The express language of the prov-

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[23] There is no merit to the assertions of Wyoming and Riverton that their state courts "failed to assign any meaning or purpose to the water proviso," "elected to write [it] into oblivion," or improperly relegated it to "the dustbin of history." Pet. at 17, 18; Cross-Pet. at 11. Wyoming and Riverton simply object to the fact that their interpretation of the proviso was rejected by the Wyoming courts.

[24] In arguing that any preexisting treaty rights were terminated, Wyoming also chides the Supreme Court of Wyoming for "fail[ing] even to address the fact that Congress carefully considered and refused to enact a limited reserved water right [on the Reservation in connection with the 1905 Act and a 1914 appropriations act.]" Pet. at 17, 12. But the Wyoming Supreme Court specifically addressed these legislative proposals and concluded that their rejection was "no indication that there was no intent to reserve water." Pet. App. at 31a, 29a. In any event, the fact that Congress did not enact *affirmative* legislation regarding reserved water rights in 1905 or 1914 has no bearing whatsoever on whether Congress intended to *abrogate* a preexisting right under the 1868 Treaty.

The State emphasizes that, in connection with the 1914 proposal, the Assistant Commissioner of Indian Affairs had testified that "the water proviso [to the 1905 Act] had 'practically nullified' Federal reserved water rights under *Winters*." Pet. at 13. The State fails to note, however, that the Assistant Commissioner also testified that he supported the 1914 proposal that would have expressly recognized certain reserved water rights because "otherwise the Indians *stand a chance* of losing their water rights *or else taking their water rights status to the court* for determination." Hearings before the Subcommittee of the Committee on Indian Affairs, Indian Appropriations Bill 379 (1914), Wyo. Exh. WRIR I&P-15 (emphasis added). At most, the testimony

iso does not purport to terminate any rights under the 1868 Treaty, *see supra* note 20, and the 1905 Act contains a savings clause expressly protecting the preexisting treaty rights of the Indians against infringement by implication.[25] Pet. App. at 774a. Moreover, as the Supreme Court of Wyoming noted, Congress clearly "knew how to express a relinquishment of reserved water rights," *id.* at 30a, because it had done so explicitly in an agreement only ten years earlier with the Tribes in connection with the 1896 cession. First McLaughlin Agreement, 30 Stat. 62, 94 (ceding 55,000 acres "*and the water rights appertaining thereunto*") (emphasis added). In short, as the Wyoming courts correctly held, the water proviso falls far short of this Court's exacting requirements for finding a termination of Indian treaty rights.[26] Pet. App. at 30a.

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reveals that, in 1914, the Assistant Commissioner thought the Indians might "stand a chance" of losing water rights unless they went to court. Subsequently, of course, the government did go to court and established the water rights of the Tribes under the 1868 Treaty. United States v. Hampleman, *supra*; United States v. Parkins, *supra*.

[25] The savings clause of the 1905 Act provides:

> It is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreement, not inconsistent with the provisions of this agreement.

1905 Act at art. 10; Pet. App. at 774a.

[26] *E.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (" 'Absent explicit statutory language,' . . . this Court . . . has refused to find that Congress has abrogated Indian treaty rights.") (citation omitted); F. Cohen, Handbook of Federal Indian Law 223 (1982) (the applicable standard is whether "Congress [has] show[n] a 'clear and plain' intention to abrogate Indian treaty rights").

There is no inconsistency between the rulings below and United States v. Dion, 476 U.S. 734 (1986), cited here by Wyoming, Pet. at 17, for the State has not provided "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that

In sum, Wyoming's argument regarding the water proviso was rejected, and correctly so, at every level of the Wyoming state court system. Moreover, the argument applies only to the Wind River Reservation because it turns on the unique statutory language, legislative history, and administrative interpretation of the water proviso, as underscored by the State's reliance below on 348 "intent and purposes" exhibits.[27] Accordingly, review is not warranted.

B. The Wyoming Courts Were Correct in Applying the PIA Standard To Quantify the Water Rights Reserved Under the Treaty for the Agricultural Purposes of the Reservation.

Review of the PIA issue is unwarranted. Wyoming is simply wrong in asserting that this Court has not resolved "[t]he appropriate quantification standard for reserved

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conflict by abrogating the treaty." 476 U.S. at 740. The State's reliance upon the legal standards set forth in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), Pet. at 17, is also misplaced. Those standards, as more recently summarized in Solem v. Bartlett, 465 U.S. 463, 469-72 (1984), govern the issue whether—for purposes of determining the scope of state criminal, civil, or regulatory jurisdiction—a portion of an Indian reservation opened for non-Indian settlement has been disestablished from the original reservation. *See infra* pages 34-37. By contrast, the thrust of Wyoming's argument is that the water proviso abrogated the preexisting reserved water rights for the *entire* Reservation. This claim is subject to the exacting requirements of this Court for finding an abrogation of Indian treaty rights. County of Oneida, 470 U.S. at 247; Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979).

[27] Even by Wyoming's own count, the issue is relevant to at most three other Indian reservations, Pet. at 12 n.10, and, on one of the three, the Fort Peck Indian Reservation, the State of Montana and the Assiniboine and Sioux Tribes have already reached a settlement under which those Tribes will have reserved rights to more than twice the amount of water quantified for the Shoshone and Northern Arapaho Tribes by the Wyoming courts. Mont. Code Ann. § 85-20-201 (1987). In any event, the terms of the statutes relating to those other Indian reservations are all quite different from the water proviso to the 1905 Act.

water rights of an agricultural Indian reservation." Pet. at 18. In *Arizona I*, this Court, in quantifying the reserved water rights for five agricultural Indian reservations, addressed this very issue and held that PIA—"enough water . . . to irrigate all the practicably irrigable acreage"—was "the only feasible and fair way by which reserved water for the reservations can be measured." 373 U.S. at 600, 601. As the Wyoming courts correctly held, the PIA standard remains good law. Pet. App. at 47a, 228a-29a, 532a.

In *Arizona I*, with respect to the issue of quantification, the Court first ruled that, when the five Indian reservations were established, water was reserved "to satisfy the *future* as well as the present needs of the Indian Reservations." 373 U.S. at 600 (emphasis added). In so ruling, the Court affirmed the decision of the Special Master, who had rejected the argument that the amount of reserved water was limited to the actual needs of the Indians when their reservations were established.[28] Report of Simon H. Rifkind, Special Master, *Arizona v. California*, No. 8 Original, at 260-61 (Dec. 5, 1960) ("Special Master's Report").

The Court in *Arizona I* next addressed the more difficult question of how to measure the reserved rights for the Indian reservations in a manner that would allow, as later described in *Arizona II*, "a fixed present determination of

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[28] In rejecting this argument, the Special Master noted:

> Certainly the possibility of expanding populations, expanding agricultural development, and hence expanding water needs must have been apparent at the time each Reservation was created. It is unreasonable to attribute to the United States an intention or an expectation that the Indians would remain stagnant or die out when they were settled on a Reservation. Since the Indians could remain on these Reservations and develop their society and economy only if water from the Colorado River was available to meet their future needs, I have found that the United States, when it reserved water, reserved it for all of such needs.

Special Master's Report at 260-61.

future needs for water." *Arizona II*, 460 U.S. at 623 (emphasis and footnote omitted). Arizona argued that the quantity of water reserved should be measured by the "reasonably foreseeable needs" of the Indians, which, as this Court noted, "in fact, means by the number of Indians." *Arizona I*, 373 U.S. at 600-01. The Special Master had rejected Arizona's population-based quantification standard, for he concluded that it would not yield a fixed present determination that adequately measured the future water needs on the Indian reservations.[29] This Court agreed, noting that "[h]ow many Indians there will be and what their future needs will be can only be guessed." *Id.* at 601.[30]

This Court then adopted the Special Master's recommendation that the amount of water reserved for the agricultural Indian reservations be measured not by Indian population, but rather by the amount of practicably irrigable acreage on the reservations. *Id.* at 600-01. As the Special Master had concluded, the PIA standard "will pre-

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[29] The Special Master rejected a population-based quantification standard for three reasons. First, a standard based solely on the water needs of the present Indian population "would defeat the basic purpose of reserving water to meet future requirements." Special Master's Report at 263. Second, an open-ended standard based on the needs of the present Indian population, but subject to adjustment as the Indian population increased, would provide neither the Indians nor the non-Indians with the requisite certainty of water availability to make long-term investment decisions regarding the development of their land. *Id.* at 264. Finally, a standard based on a present projection of future Indian population growth and water needs was rejected because of "the difficulty of predicting the future needs of Indian Reservations" and the risk that failing properly to foresee those needs "would result in a forfeiture of the Indians' water rights and would stultify development of the Reservations." *Id.* at 264.

[30] The Court also rejected Arizona's argument that the judicial doctrine of equitable apportionment, a method of resolving water disputes between States, should be used in quantifying the reserved water rights of the Indians. 373 U.S. at 596-97.

serve the full extent of the water rights created by the United States and will establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users."[31] This Court agreed, concluding that the PIA standard was "the only feasible and fair way" to quantify reserved water rights for agricultural Indian reservations, 373 U.S. at 601, for, as this Court later summarized in *Arizona II*, "the irrigable-acreage standard allowed a present water allocation that would be appropriate for *future* water needs." 460 U.S. at 617 (emphasis added).

The PIA ruling in *Arizona I* was "hotly contested by the States, who argued that [the PIA standard was] a much too liberal measure." *Id.* Since then, the States have twice sought to overrule *Arizona I*, but this Court has rebuffed both attempts. *Cappaert*, 426 U.S. at 139 n.4; *Arizona II*, 460 U.S. at 625-26.

Wyoming again seeks to challenge the PIA standard, asserting here that it is at odds with a "rapidly evolving necessity standard" said to be evident in certain decisions of this Court since *Arizona I*.[32] Pet. at 23, 19-22. But each

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[31] Special Master's Report at 265. As the Special Master noted, the PIA standard was also consistent with the intent of the United States in establishing the Indian reservations because "the land originally withdrawn for each of the five Indian Reservations was considerably more extensive than was necessary to support the Indians who inhabited the Reservations immediately after their establishment." *Id.* at 262. According to the Special Master, "[t]he only explanation for this withdrawal of excess irrigable acreage is that the United States intended it to be utilized in the future. It must have been apparent that unless the United States reserved water for the land at the time of withdrawal, there might be no water left to appropriate at th. time that the land was needed for the purposes for which it was withdrawn." *Id.* at 262-63.

[32] Wyoming also seeks to distinguish this case from *Arizona I* on the ground that the Indian reservations in that case "had been set aside for the future requirements of unknown tribes." Pet. at 19. But this

of the decisions that Wyoming argues has eroded the vitality of *Arizona I* in fact followed that decision and cited it with approval.[33]

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point was not even mentioned in this Court's decision in *Arizona I*, and the portion of the Special Master's Report in *Arizona I* cited by Wyoming states only that "in *some* instances it was not clear *which* Indian tribes would ultimately be settled on a particular Reservation." Special Master's Report at 262 (emphasis added). In any event, at the time the Wind River Indian Reservation was established, it was not known that the Northern Arapahos would also be settling on the Reservation and making demands upon its water supply. *See* Shoshone Tribe v. United States, 299 U.S. at 486-92.

[33] Two of the cases cited by Wyoming, Cappaert v. United States, 426 U.S. 128 (1976), and United States v. New Mexico, 438 U.S. 696 (1978), involved the quantification of reserved water rights on non-agricultural federal enclaves. In each instance, the Court cited with approval to *Arizona I* for the proposition that reserved water rights are measured by "that amount of water necessary to fulfill the purpose of the reservation, no more." Cappaert, 426 U.S. at 141; United States v. New Mexico, 438 U.S. at 700. There was no express or implied criticism of the PIA standard. Indeed, *Arizona I* is cited as supporting and being fully consistent with the result reached in both decisions.

Wyoming is correct in suggesting that there were lesser awards in these decisions than in *Arizona I*. The reason for this is not that *Arizona I* is no longer good law, but rather that the policy considerations involved in the quantification of reserved water rights on federal enclaves are different from, and favor lesser awards than, those in cases quantifying reserved water rights for Indian reservations. *See infra* note 49; F. Cohen, Handbook of Federal Indian Law 581-85 (1982).

The third case on which the State relies, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) ("*Fishing Vessel*"), involved an apportionment of off-reservation fish between Indians and non-Indians. The Court in *Fishing Vessel* cited *Arizona I* and *Winters* as examples of prior court-ordered apportionments of natural resources between Indians and non-Indians "that assured that the Indians' reasonable livelihood needs would be met." 443 U.S. at 685-86. Again, there was no express or implied criticism of the PIA standard.

The final case cited by Wyoming, *Arizona II*, was an attempt by

Moreover, Wyoming is simply wrong in suggesting that the PIA standard in *Arizona I* is divorced from "any concepts of necessity."[34] Pet. at 21. The Court in *Arizona I*, noting that "water from the river would be essential to the life of the Indian people . . . and the crops they raised," specifically adopted the PIA standard as a means of quantifying reserved water for "the future as well as the present *needs* of the Indian reservations." 373 U.S. at 599, 600 (emphasis added). Similarly, as this Court noted in

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the Indian tribes involved in *Arizona I* to reopen the decree because they claimed that certain practicably irrigable lands had been omitted from the claims presented by the United States on their behalf in *Arizona I*. This Court held that the tribes were not permitted to relitigate this issue, in light of the "compelling need for certainty" and "the strong interest in finality" in Western water-rights adjudications. Arizona II, 460 U.S. at 620. In the passage cited by Wyoming, the Court was not casting doubt on the continuing vitality of *Arizona I*, but rather was explaining to the tribes that the need for finality applied with equal force to arguments that the States also desired to relitigate.

[34] Wyoming repeatedly asserts that the Wyoming courts erred in quantifying the reserved water rights of the Tribes "in the absence of any demonstrated necessity for the water." Pet. at 18, 21, 24. But the district court specifically found that "[w]ithout water, the reservation could never have accomplished it's [sic] prime purpose: the development of agriculture." Pet. App. at 211a. The district court further found that there are large unfarmed tracts of practicably irrigable acreage on the Reservation. *Id.* at 229a-30a, 258a. In these circumstances, the district court was correct in applying the PIA standard to quantify the water rights reserved under the Treaty for the agricultural purposes of the Reservation. *Id.* at 228a-29a.

The Wyoming courts also correctly held that, although the PIA standard is used to quantify the amount of water reserved by reference to the agricultural purposes of the Reservation, the Tribes are not limited to using this reserved water for farming, but rather may "make such use of the water covered by their reserved water rights as they deem advisable." Pet. App. at 183a, 194a. The State has not challenged this ruling. The only restrictions imposed by the Wyoming courts are that the Tribes may not increase their consumptive use of water and may not use the water off the Reservation. *Id.* at 183a. The Tribes are challenging the latter restriction in their conditional cross-petition in No. 88-492.

Arizona II, the PIA standard is "a measure [that] allow[s] a fixed present determination of future *needs* for water." 460 U.S. at 623 (emphasis omitted and added) (footnote omitted).

Wyoming is also wrong in asserting that there is "confusion" or "conflict[s]" among the lower courts regarding the PIA standard.[35] Pet. at 20-22; 23-26. The Supreme Court of Wyoming certainly was not confused; it reviewed all the cases cited here by Wyoming and concluded that PIA was the proper standard for quantifying the agricultural reserved water rights under the Treaty. Pet. App. 47a. Indeed, the Indian water-rights cases decided by the lower courts after *Cappaert* and *New Mexico* have uniformly followed the PIA standard set forth in *Arizona I*.[36]

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[35] The Ninth Circuit decisions said to be in conflict with the ruling of the Wyoming Supreme Court on the PIA issue, Pet. at 23-26, were both decided long before *Arizona I*, and the Ninth Circuit, citing to *Arizona I*, has recently observed that "the scope of Indian irrigation rights is well settled." United States v. Adair, 723 F.2d 1394, 1415 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984). In any event, the Ninth Circuit decisions are not in conflict with the ruling below, and indeed the Special Master in *Arizona I* had specifically stated that the Ninth Circuit decisions relied upon here by Wyoming were entirely consistent with using the PIA standard. Special Master's Report at 261, 258-60.

Wyoming relies on White Mountain Apache Tribe v. United States, 11 Cl. Ct. 614 (1987) as the single example of confusion among the lower courts. But the quoted passage from that case does not reveal any confusion, and, in any event, the Court of Claims acknowledged that "this is not a Winters doctrine case insofar as the Court of Claims lacks jurisdiction to adjudicate claims over plaintiff's reserved water rights in terms of future use." *Id.* at 626.

[36] United States v. Anderson, 736 F.2d 1358, 1361 (9th Cir. 1984), *affirming* 591 F. Supp. 1, 8-9 (E.D. Wash. 1982); United States v. Adair, 723 F.2d 1394, 1415-16 (9th Cir. 1983), *affirming* 478 F. Supp. 336 (D. Ore. 1979), *cert. denied*, 467 U.S. 1252 (1984); Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981), *affirming* 460 F. Supp. 1320, 1329-31 (E.D. Wash. 1978), *cert. denied*, 454 U.S.

This Court was correct in *Arizona I* in holding that the PIA standard is "the only fair and feasible way" to measure Indian reserved water rights for agricultural purposes. Wyoming never explains why it believes this Court's original PIA ruling was wrong or what quantification standard it believes should be used in this context.[37] The thrust of Wyoming's argument appears to be that the Wyoming courts erred in quantifying an amount of reserved water in excess of "the Reservation's historical needs." Pet. at 26. But this argument was quite properly rejected in *Arizona I*,[38] and Wyoming has offered no persuasive reason

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1092 (1981); Montana v. Confederated Salish and Kootenai Tribes, 712 P.2d 754, 764 (Mont. 1985).

[37] In the proceedings below, Wyoming asserted that the PIA standard was too generous a measure of the reserved water rights under the Treaty, for, according to Wyoming, the Indians were only entitled to an amount of reserved water for their "minimal" or "moderate living" needs on the Reservation. Brief of Appellant State of Wyoming (Type 1 Claims) 51 (Dec. 5, 1985). But the State never proffered any evidence at all to support the assertion that the amount of reserved water quantified under the PIA standard exceeded the "minimal needs" or "moderate living" requirements of the Indians.

Nor was there any such evidence to proffer. The water quantified under the PIA standard is desperately needed to improve the economy on the Reservation, where, according to a governmental study released last month, the unemployment rate among Indians is in excess of seventy per cent. Riverton (Wyo.) Ranger, Oct. 13, 1988, at 1. This figure is up substantially from the forty-five per cent figure cited in the 1982 Report of Special Master Roncalio. Pet. App. at 568a-69a.

[38] The Special Master in *Arizona I* concluded that "[i]t is clear that the water rights of the five Reservations in question cannot be fixed at present uses for this would defeat the basic purpose of reserving water to meet future requirements." Special Master's Report at 263. This Court agreed, ruling that the reserved water "was intended to supply the future as well as the present needs of the Indian Reservations." Arizona I, 373 U.S. at 600. This ruling has not been eroded by subsequent decisions of this Court. *See supra* note 33.

There is no merit to the argument that the Wyoming courts erred in quantifying the reserved water rights under the Treaty in excess of

why this Court should reconsider the PIA standard that has now been followed for twenty-five years in litigation and settlements throughout the West. Accordingly, review should be denied.

C. The Supreme Court of Wyoming Correctly Assigned a Priority Date of 1868—the Date of the Treaty—to the Reserved Water Rights Under the Treaty.

In accordance with this Court's ruling in *Arizona I* that reserved water rights "vest[]" and become "effective" at the time an Indian reservation is created, 373 U.S. at 600, the Supreme Court of Wyoming correctly assigned an 1868 priority date to the water rights reserved under the Treaty. Pet. App. at 72a-75a. Wyoming seeks review of this ruling as it applies to the water rights associated with certain portions of the Reservation.

1. Lands Opened for Non-Indian Settlement, But Not Sold, Under the 1905 Act

Wyoming first challenges this ruling as it applies to the water rights associated with the Reservation lands that were opened for non-Indian settlement under the 1905 Act but never sold (the "unsold lands"). Wyoming asserts that an 1868 priority date should not be assigned to these water rights because the unsold lands were "disestablished" from the Reservation by the 1905 Act.

Review of this issue is not warranted. At the outset, the issue whether the 1905 Act disestablished the unsold lands is beside the point, for it relates only to the jurisdictional authority of the State over these lands, not to the priority date to be assigned to the water rights associated with these lands.[39] In any event, even if the dis-

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the Tribes' historical irrigation needs because, as Wyoming asserts, the Reservation has already achieved "full irrigation development." Pet. at 23-26. As previously noted, Wyoming's assertion that the Reservation has achieved "full irrigation development" is directly contrary to the findings of the Wyoming courts. *See supra* page 14.

[39] The disestablishment cases decided by this Court have involved

establishment issue were relevant, this Court has already resolved the governing legal standards, and the Wyoming courts correctly applied those standards in reaching the fact-specific ruling that these particular lands were not disestablished. Pet. App. at 411a, 225a, 75a.

At the turn of the century, Congress enacted a number of so-called "surplus land" or "opening" acts—such as the 1905 Act—that opened Indian reservations to non-Indian settlement and have since resulted in "a spate of jurisdictional disputes" regarding the status of the opened lands.[40] *Solem v. Bartlett*, 465 U.S. 463, 466-67 (1984) ("*Solem*"). This Court, after resolving a number of these

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disputes regarding the extent of state jurisdiction over civil, criminal, or regulatory matters on a portion of an Indian reservation opened for settlement under a surplus-land act. *E.g.*, Solem v. Bartlett, 465 U.S. 463 (1984). By contrast, the thrust of Wyoming's argument here is that the 1905 Act terminated any reserved water rights under the 1868 Treaty for the unsold lands in the opened portion of the Reservation. Wyoming fails to explain why the reserved water rights for the unsold lands were lost under the 1905 Act, which simply established a trust arrangement for possible land sales to non-Indians, pursuant to which less than 10 per cent of the opened lands were sold. In rulings affirmed by the Wyoming courts, the Special Master correctly held that the Tribes had retained unbroken equitable title to the unsold lands under the 1905 Act, and that "[n]othing in the 1905 Agreement, nor the circumstances surrounding it, would lead one to conclude that the Indians or the [United States] intended that the water rights associated with the opened or ceded lands disappear as of the date of the Agreement." Pet. App. at 415a-16a, 420a, 225a, 75a.

The disestablishment issue was relevant in this case to the issue of the State's jurisdiction over the administration of water rights on the opened portion of the Reservation, *id.* at 75a-79a, but the State has elected not to seek review of the ruling below on that issue.

[40] The resolution of these disputes has been complicated by the fact that there is a notable lack of uniformity among the surplus-land acts, for Congress proceeded "on a reservation-by-reservation basis, with each surplus land Act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." Solem v. Bartlett, 465 U.S. 463, 467 (1984).

disputes, has now developed a "fairly clean analytical structure" for determining whether, for jurisdictional purposes, the opened lands remain part of the original Indian reservation or have been "disestablished" by the surplus-land act from what remains as the "diminished" reservation. *Id.* at 470.

Those legal standards, which are summarized in *Solem*, 465 U.S. at 469-72, involve a case-by-case inquiry, because "[t]he effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Id.* at 469. Because there is a "presumption" that such acts do not diminish a reservation, *id.* at 481, this Court has required "substantial and compelling evidence of a congressional intention to diminish Indian lands." *Id.* at 472.

The Wyoming courts correctly applied these settled legal standards in concluding that neither the terms of the 1905 Act nor the circumstances surrounding the opening of the Reservation provide the requisite evidence of a congressional intention to disestablish the opened lands. Pet. App. at 420a, 225a, 75a. The Special Master, whose rulings were affirmed by the Wyoming courts, concluded that the 1905 Act had not disestablished the opened lands, for it had simply established "a trust relationship, with the United States acting as [the Tribes'] trustee for the sale of certain Indian lands to settlers."[41] *Id.* at 415a. Because of this

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[41] Although the 1905 Act refers to the cession of the opened lands, the United States specifically agreed under the 1905 Act to act only "as trustee for said Indians to dispose of [the opened] lands," and obligated itself to pay the Tribes "the proceeds received from the sale [of the opened lands] only as received." 1905 Act at arts. 1, 9; Pet. App. at 769a, 774a. Thus, the 1905 Act, unlike the 1872 and 1896 cessions, *see supra* note 1, was not an outright sale of Reservation lands in return for a fixed cash payment. Indeed, a provision of the 1905 Act recognizes that some of the opened portion of the Reservation would "remain the property of said Indians." 1905 Act at art. 3; Pet. App. at 772a.

trust arrangement, Indian title to the opened but unsold lands was "not extinguished" by the 1905 Act. *Id.* at 638a. The Special Master specifically concluded that "[n]othing in the 1905 Agreement, nor the circumstances surrounding it, would lead one to conclude that the Indians or the [United States] intended that the water rights associated with the opened or ceded lands disappear as of the date of the Agreement." Pet. App. at 420a.

The rulings below are not in conflict with the decisions cited here by Wyoming. Contrary to Wyoming's assertion that this case involves "circumstances virtually identical" to those in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), Pet. at 28, the Special Master specifically concluded that "this case—and its 1905 Act—differ substantially from the facts and circumstances involved in Rosebud."[42] Pet.

In light of this statutory language and the circumstances surrounding the opening of the Reservation in 1905, the Special Master, in a ruling affirmed by the Wyoming courts, held that the intent of the 1905 Act was not to disestablish the opened portion of the Reservation, but rather for "the Indians [to] convey to the United States only the right to dispose of [these] lands, i.e., to act as an agent with the power of attorney necessary to pass perfect title to a purchaser." Pet. App. at 414a.

[42] One prominent consideration in *Rosebud*, as later summarized in *Solem*, was that "non-Indian settlers flooded into the opened portion of [the] reservation and the area ha[d] long since lost its Indian character." *Solem*, 465 U.S. at 471. By contrast, on the Wind River Reservation, less than ten per cent of the opened lands were acquired by non-Indian settlers under the 1905 Act, Pet. App. at 412a-13a, and the vast majority of the opened lands that were not sold under the 1905 Act are still owned by the Tribes.

Wyoming focuses on the fact that the Special Master had distinguished this case from *Rosebud* by the absence of the word "convey" in Article I of the 1905 Act. Pet. at 28. But the Special Master treated this point as only one "example" of why "this case—and its 1905 Act—differ substantially from the facts and circumstances involved in Rosebud." Pet. App. at 419a.

App. at 419a. Nor, as Wyoming asserts, is "the reasoning below in conflict with the principles announced in" *Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985) ("*Klamath*"), and *Arizona II*.[43] Pet. at 28. Finally, Wyoming's repeated assertion that the opened, but unsold, lands on the Reservation were "public lands," Pet. at 27, 4, 6, was correctly rejected not only by the Wyoming courts in this case,[44] but also by the Department of the Interior in a proceeding nearly four decades ago.[45]

In sum, even if the disestablishment issue were relevant, the Wyoming courts correctly applied this Court's well-settled legal standards to the particular facts surrounding the 1905 Act. Review is not warranted.

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[43] Because the diminution of the Indian reservation in *Klamath* had been "acknowledged," 473 U.S. at 772 n.22, the Court's analysis of the "savings clause" in that case focused on what treaty rights had survived the conceded diminution of the reservation. By contrast, the question here is whether—in light of the "savings clause" to the 1905 Act, the other provisions of that Act, and the surrounding circumstances—Congress intended to terminate the reserved water rights under the 1868 Treaty for the opened, but unsold, lands.

Similarly, the State's reliance on *Arizona II* is misplaced because the portion of that decision cited here by the State refers to the proper priority date to be assigned to water rights associated with *new* lands that the United States has added to an Indian reservation after it was established. 460 U.S. at 641. By contrast, the issue presented here is whether the water rights associated with lands that were part of the *original* Reservation are entitled to a Treaty-based priority date.

[44] In a ruling affirmed by the Wyoming courts, the Special Master properly concluded that the unsold lands were not public lands, but rather had always remained "Indian lands" under this Court's controlling decision in Ash Sheep Co. v. United States, 252 U.S. 159 (1920). Pet. App. at 415a-16a.

[45] *In re Gallivan*, 60 I.D. 417, 419 (1950) (ruling that the federal statute governing mineral leasing on "public lands," 41 Stat. 437 (1920), was inapplicable to "the ceded but undisposed-of lands" on the Reservation, because these were "Indian lands").

2. Reservation Lands Reacquired by the Tribes

Wyoming asserts that the Supreme Court of Wyoming erred in assigning an 1868 priority date to the water rights associated with Reservation lands that have been reacquired by the Tribes from non-Indians who had purchased the land from individual Indian allottees ("reacquired allottee lands") or had acquired it under the homestead laws ("reacquired homestead lands"). The ruling below is said to conflict with two Ninth Circuit decisions. *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) (*"Anderson"*); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981) (*"Walton II"*).

Review of this question is not warranted.[46] With respect to the water rights associated with the reacquired allottee lands, Wyoming asserts that the ruling below is in conflict with *Walton II* and *Anderson* because the Supreme Court of Wyoming "required no showing [by the Tribes] that the reserved right continued to be used by the intervening non-Indian owner[s]." Pet. at 29. The Ninth Circuit cases hold that reserved water rights on lands previously held by allottees are lost if not maintained through continuous use by the subsequent non-Indian owner. *Anderson*, 736 F.2d at 1362; *Walton II*, 647 F.2d at 51. But, in this proceeding—where the Tribes have consistently claimed an 1868 priority date for the reserved water rights associated with the reacquired allottee lands—, neither Wyoming nor any other party made a proffer that any of these reserved water rights had in fact been lost through non-use. Because there was no such proffer, the Supreme Court of Wyoming, in a ruling fully consistent with the Ninth Cir-

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[46] If this Court were to grant review of this question, the Tribes agree with Riverton, Cross-Pet. at 22, that the Court should review the question as it applies not only to the reserved water rights claimed by the Tribes, but also to those claimed by the non-Indians who asserted reserved water rights in this proceeding. *See* Tribes' Cross-Petition at 29-30.

cuit decisions, properly assigned these water rights a Treaty-based priority date of 1868.

Nor is it apparent that there is a conflict with the Ninth Circuit regarding the priority date for the reserved water rights associated with the reacquired homestead lands. The opinion below does not expressly address this question, *see* Pet. App. at 75a, and the Supreme Court of Wyoming could well have concluded that, here too, Wyoming had failed to make the appropriate proffer. In any event, there is no express or implied criticism of *Anderson* in the decision of the Supreme Court of Wyoming and thus no conflict that would be apparent to other courts that might later address the issue.[47]

D. The Supreme Court of Wyoming Demonstrated More than Ample "Sensitivity" to Non-Indian Water Users.

Riverton asserts that the decision of the Supreme Court of Wyoming is in conflict with *United States v. New Mexico*, 438 U.S. 696 (1978) (*"New Mexico"*). According to Riverton, *New Mexico* "instructs that the quantification of a Federal reserved water right must be sensitive not only

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[47] In any event, the issue whether a non-Indian settler has acquired reserved water rights when purchasing lands on an Indian reservation would necessarily depend on the terms of the specific surplus-land act that opened the Indian reservation to non-Indian settlement. There is considerable variety among these statutes because they were enacted "on a reservation-by-reservation basis, with each surplus land Act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." Solem, 465 U.S. at 467. Accordingly, the mere existence of different results between two decisions on this issue does not necessarily mean that there is a conflict between them.

Moreover, even assuming *arguendo* that there was an implicit conflict with *Anderson* and that the decision below was in error, resolving this issue will have no practical effect upon the parties, for, as previously noted, the state district court deleted its only finding that the quantification of reserved water rights in this proceeding will have any adverse effect on other water users. *See supra* note 8.

to Congress' policy of deference to state water law, but also to the rights of state and private water users who are the victims of the quantification." Cross-Pet. at 10-11. Riverton urges this Court to grant review "to apply its decision in *United States v. New Mexico*, and thereby to protect state and private water users in the Big Horn Basin from a gallon-for-gallon reduction in their water rights, and to rescue the 1905 Act from the dustbin of history." *Id.* at 11.

This argument is vastly overblown, and review is not warranted. Two of the reasons why have already been noted: First, the Supreme Court of Wyoming specifically found that this case does *not* give rise to the concern expressed in *New Mexico*, 438 U.S. at 705, that reserved water rights may "require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *See supra* pages 12-13. Second, the Wyoming courts carefully analyzed the 1905 Act and correctly concluded that Congress had not deferred to state law for the acquisition of water rights for the Reservation. *See supra* pages 19-24. In short, neither of the two factors cited by Riverton as warranting "sensitivity" under *New Mexico*—reductions in available water to non-Indian users and congressional deference to state water law—is even presented in this case.

In any event, the Supreme Court of Wyoming demonstrated more than ample sensitivity to the needs of non-Indian water appropriators.[48] In response to the same ar-

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[48] Riverton appears to read *New Mexico* as requiring the imposition of "equitable" remedies to protect non-Indian water users from any adverse impact arising from the quantification of reserved water rights. Cross-Pet. at 17. But no such remedies were even considered in *New Mexico*, and this Court has consistently rejected the argument that reserved water rights must be balanced against the state water rights of junior appropriators. *Winters*, 207 U.S. at 570-71, 576 (rejecting claim of junior non-Indian water users who had already invested "many

gument presented here, the Supreme Court of Wyoming cited a number of key rulings it had rendered against the Tribes and the United States and concluded that "[a]ll of this evidences a sufficient sensitivity to the water needs of other water users." Pet. App. at 72a. Indeed, as set forth in the Tribes' conditional cross-petition, the state supreme court was excessively sensitive to the needs of non-Indian water users, for several of the key rulings against the Tribes and the United States are in error.

Finally, whereas Riverton asserts that the Wyoming courts lacked "sensitivity" towards the non-Indian water users, Riverton itself is wholly lacking in any sensitivity to the different policy considerations involved in cases quantifying Indian reserved water rights, such as this proceeding, than in cases quantifying federal reserved water

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thousands of dollars" and who claimed that, if senior reserved water rights were recognized, "their lands will be ruined, it will be necessary to abandon their homes, and they will be greatly and irreparably damaged"); Arizona I, 373 U.S. at 596-97 (rejecting the argument that "equitable apportionment" should be "used to divide the water between the Indians and the other people in the State of Arizona"); Cappaert, 426 U.S. at 138-39 (rejecting the argument that reserved water rights "call[] for a balancing of competing interests" and adhering to both *Winters* and *Arizona I*).

Accordingly, the Supreme Court of Wyoming correctly rejected the proposed storage requirements and other limitations on the exercise by the Tribes of their reserved water rights. As noted below, "[t]he requirement that [the Tribes] must first construct storage facilities to supply their entitlement flies in the face of the object of the reserved water right—a prior entitlement to the waters." Pet. App. at 71a.

When read in proper context, the comment regarding "sensitivity" in Justice Powell's partial dissent in *New Mexico*, 438 U.S. at 718, and the passages of the majority opinion relied upon here by Riverton, 438 U.S. at 700, 701-02, 705, simply stand for the proposition that the courts should engage in a careful examination of the purposes for which water was impliedly reserved. That was done in this proceeding, and indeed the Court in *New Mexico* specifically cites both *Winters* and *Arizona I* as examples of that careful consideration. 438 U.S. at 698-705.

rights, such as *New Mexico*.[49] Those differences favor lesser awards in federal cases, than in Indian cases.

In sum, Riverton is simply wrong in asserting that "[t]he circumstances of this case fall squarely within *New Mexico*." Cross-Pet. at 13. In any event, the ruling of the Supreme Court of Wyoming is fully consistent with this Court's decision in *New Mexico*.

E. Riverton's Discount-Rate Argument Is Without Merit and Unworthy of Review.

Riverton contends that the Wyoming courts erred, in assessing the economic feasibility of possible future irrigation of presently undeveloped tribal lands, by using an economic discount rate lower than one prescribed by a federal statute, 41 U.S.C. § 1962d-17(a), for the formulation and evaluation of federal water projects. Cross-Pet. at 19-22. Credible expert testimony supported the discount rate (4 per cent) used by the Wyoming courts. *See* Pet. App. at 53a-54a. Riverton claims that, nonetheless, the courts were required to use 7-1/8 per cent, the rate prescribed under the federal statute for the year 1979.

On its face, the statute on which Riverton relies has no application to quantification of Indian water rights. Riverton cites no authority suggesting such an application, and relies weakly on one decision holding only that Con-

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[49] Among other considerations, the reserved water rights here were established under a Treaty with the United States as opposed to unilateral action by Congress or the President in establishing non-Indian federal public lands; non-Indian federal water rights can be disposed of by the federal government without limitation, but Congress cannot abrogate Indian treaty rights without providing just compensation; and public lands of the federal government are generally subject to state regulation, whereas Indian lands are not. The award of water to fulfill the primary purpose of maintaining a national forest should be smaller than a quantification of the water rights necessary to establish a permanent Indian settlement. *See* F. Cohen, Handbook of Federal Indian Law 581-85 (1982).

gress intended the statutory rate to be used in environmental-impact statements. Cross-Pet. at 22 n.27 (citing *Johnson v. Davis*, 698 F.2d 1088, 1092 (10th Cir. 1983)). Riverton's argument also depends on its assumption that the Tribes could implement future irrigation projects only by obtaining federal funds, which is sheer speculation. Even if they did so, and that were held to make the statute relevant, any applicable discount rates under the statute would be those in effect at the future times when the projects were proposed and evaluated, which of course is presently unknowable. The rate for the year 1979 would have no relevance whatever.

The Wyoming courts correctly held that the statute does not mandate using the 7-1/8 per cent rate in this proceeding. Pet. App. at 53a-54a. Review of this question is unwarranted.

F. The Supreme Court of Wyoming Correctly Rejected Riverton's Estoppel Argument.

Riverton argues that the Wyoming courts erred in not holding the United States estopped from asserting reserved water rights on behalf of the Tribes. Cross-Pet. at 24-30. This claim of estoppel is not based on alleged misrepresentations by federal officials. Rather, Riverton asserts that the United States should be estopped because of the acts of "Congress itself," namely, the passage of the various homesteading acts and the 1905 Act. Cross-Pet. at 26 & n.37.

Review of this insubstantial claim should be denied. This Court has "left open the possibility of estoppel against the Government only in a rather narrow possible range of circumstances," *Heckler v. Community Health Services*, 467 U.S. 51, 68 (1984) (Rehnquist, J., concurring in judgment), and the Supreme Court of Wyoming correctly held that this case does not present such circumstances. Pet. App. at 22a-23a. Although Riverton focuses on attacking the ruling below that "affirmative misconduct" by the United

States had not been established, Riverton and the other moving parties failed to prove several other essential elements of estoppel, including detriment to their state water rights and reasonable reliance upon the 1905 Act.[50] In any event, even if the United States were estopped in this proceeding, the water rights reserved under the Treaty are rights of the Tribes, not the United States. Riverton has not even contended that the Tribes' conduct is a basis for its estoppel claim, nor has Riverton explained how conduct of the United States vis-à-vis non-Indian settlers can affect the Tribes' rights under the Treaty.

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[50] The state district court specifically deleted the finding upon which Riverton's claim of detriment to state water rights is based. *See supra* note 8. Moreover, Riverton cannot show reasonable reliance based on the water proviso to the 1905 Act because, as the Wyoming courts correctly held, the proviso was intended to assist the Indians in securing state water rights not in lieu of their reserved water rights under the 1868 Treaty, but rather as a pre-*Winters* precaution to safeguard their right to water. *See supra* pages 19-24. In any event, the United States formally began to assert reserved water rights on behalf of the Tribes after this Court's 1908 ruling in *Winters*, and the federal district court expressly recognized such rights in 1926. *See supra* pages 10-12.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition in No. 88-309 and the Cross-Petition in No. 88-553.

Respectfully submitted,

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November 21, 1988

APPENDIX

EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING

No. 753.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

ALBERT HAMPLEMAN,

Defendant.

D E C R E E

Now on this day the above entitled cause coming on to be heard, the plaintiff appearing by DAVID J. HOWELL, Assistant United States Attorney for the District of Wyoming, and the defendant, ALBERT HAMPLEMAN, appearing by his attorneys, DOUGLAS A. PRESTON, Attorney General for the State of Wyoming, and WILFRID O'LEARY, Deputy Attorney General for the State of Wyoming, and a stipulation by and between the parties hereto having heretofore been filed admitting certain of the allegations contained in plaintiff's bill of complaint, and the Court having heard the testimony of the witnesses produced by said plaintiff, and the arguments of counsel, and being fully advised in the premises, doth find for the plaintiff, and against the defendant, generally, and that the lands, ditches and water rights of the Indian allottees named in plaintiff's bill of complaint are within the absolute and exclusive jurisdiction of plaintiff.

IT IS THEREFORE CONSIDERED, ORDERED AND DECREED, that the defendant, ALBERT HAMPLEMAN, his servants, agents and employees, be, and they are hereby perpetually enjoined from hereafter committing any

trespass upon, or from in any manner impeding, obstructing or preventing the waters of South Fork of Mud Creek and of Red Creek from flowing down their natural channels to the headgates of the said Indian allottees named in plaintiff's bill of complaint, and from in any manner interfering with or preventing the use by said Indian allottees of an amount of water from said streams reasonably necessary for the irrigation of their said allotments on the basis of one cubic foot of water per second of time for each seventy (70) acres of irrigable land on said allotments.

IT IS FURTHER ORDERED that the defendant herein shall pay the costs of this action, to be taxed.

Dated this 26th day of June, A.D. 1916.

(Signed) John A. Riner

Judge.

EXHIBIT B

AGREEMENT REGARDING WATER RIGHTS IN THE CROWHEART IRRIGATION UNIT ON THE WIND RIVER INDIAN RESERVATION

WHEREAS there has arisen a dispute between Indian and non-Indian irrigators in the Crowheart Irrigation Unit ("Unit") on the Wind River Indian Reservation ("Reservation") regarding their respective rights to water in the Dinwoody Canal;

WHEREAS the Shoshone and Arapaho Tribes ("Tribes") and the State of Wyoming ("State") have endeavored to resolve this dispute through joint-factfinding and negotiation;

WHEREAS the Tribes and the State agree that the water shortages experienced during this growing season on particular fields in the Unit are not the result of an actual shortage of water supply, but rather are the result of problems with the management of the water supply and of the need for structural improvement in the irrigation and delivery system;

WHEREAS the Tribes and the State believe that, with proper management of the Unit, the Indian and the non-Indian irrigators should be able to get the full amount of water to which they would be legally entitled;

NOW, THEREFORE, be it resolved that the Tribes and the State agree as follows:

1. The Unit should be managed as efficiently as practicable, so that, if possible, the Indian and the non-Indian irrigators are able to get the full amount of water to which they would be legally entitled.

2. There shall be created a Joint Tribal-State Advisory Committee ("Committee") for the purpose of making joint recommendations to the Bureau of Indian Affairs ("BIA")

regarding any necessary changes to the management of the Unit. The Tribes and the State shall each appoint one representative to the Committee.

3. In the event that the representatives of the Committee are unable to make a joint recommendation, the Tribes and the State are free to pursue their respective rights under the Decree in the Big Horn Water Adjudication and such other rights as they may have. This agreement does not waive any rights that the Tribes or the State have under the Decree or otherwise, but rather establishes a means by which the Tribes and the State will first attempt to resolve any disputes regarding the supply of water within the Unit before resorting to litigation.

4. This agreement shall expire on October 1, 1988, unless extended in writing by the Tribes and the State.

The Shoshone Tribe

Date: 7/29/88 By: /s/ John Washakie

The Arapaho Tribe

Date: 7/29/88 By: /s/ Gary Collins

The State of Wyoming

Date: 7/29/88 By: /s/ Mike Sullivan